(1)

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1995

EX PARTE: CHARLES EUGENE CARPENTER,

Petitioner

IN RE: T. TRAVIS MEDLOCK, ATTORNEY GENERAL FOR THE STATE OF SOUTH CAROLINA,

Plaintiff,

vs.

3.75 ACRES OF REAL PROPERTY LOCATED IN MARLBORO COUNTY, SOUTH CAROLINA, AND ALL BUILDINGS, APPURTENANCES, AND IMPROVEMENTS THEREON, DEEDED TO DAVID AND VAUNICE REEP ON JANUARY 22, 1982 AND ON JUNE 1, 1982, AND TO ANOTHER PARTY IN APPROXIMATELY 1986, BUT NO DEED WAS RECORDED,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Melvin L. Roberts
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Attorney for Petitioner

42 pp

BRIEF OF PETITIONER

Petitioner, Charles Carpenter, hereby submits this Brief as his petition for a Writ of Certiorari to the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Whether a separate civil forfeiture proceeding and a separate criminal prosecution proceeding and sentence violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution made applicable to the states by the Fourteenth Amendment?

2. Whether a separate civil forfeiture proceeding and a separate criminal prosecution proceeding and sentence violates the Excessive Fines Clause of the Eighth Amendment of the United States Constitution made applicable to the states by the Fourteenth Amendment?

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Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Petitioner, Charles Carpenter, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of South Carolina entered on May

30, 1995, with the Petition for Rehearing denied on June 30, 1995.

OPINION BELOW

The decision of the Supreme Court of the State of South Carolina is opinion number 24249 and is reprinted as Appendix A. The Order denying a rehearing is reprinted as Appendix B.

JURISDICTION

The judgment of the Supreme Court of the State of South Carolina was entered on May 30, 1995, and a timely petition for rehearing was filed and subsequently denied on June 30, 1995. The jurisdiction of this Court arises under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution provides "...nor shall any person be subject for

the same offense to be twice put in jeopardy of life or limb..."

2. The Eighth Amendment to the United States Constitution provides "[e]xcessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

3. The Fourteenth Amendment to the United States Constitution provides "...no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction to the equal protection of the laws."

STATEMENT OF THE CASE

The State Grand Jury returned two (2) indictments against the Petitioner, Charles Carpenter, hereinafter referred to as "Carpenter", charging Carpenter

with two (2) counts of trafficking in cocaine and two (2) counts of trafficking in marijuana in March of 1990. Carpenter pled guilty on April 7, 1990, to one count of trafficking in cocaine under Indictment 90-GS-47-04-002 and one count of trafficking in marijuana under Indictment 90-GS-57-05-001 before the Honorable Edward B. Cottingham in Chester, South Carolina pursuant to a plea agreement with the State. Petitioner was sentenced by Judge Cottingham to twenty-five (25) years without parole and imposed a fine of $200,000 in reference to Indictment 90-GS-47-05-002 (the cocaine indictment). Petitioner was sentenced by Judge Cottingham to twenty-five (25) years without parole with a $50,000 fine in reference to Indictment 90-GS-47-05-001. This sentence was ordered to run consecutive with Petitioner's prior

sentence (Indictment 90-GS-47-05-002). The final Order in this matter was filed on February 3, 1992.

Petitioner was the owner of Defendant 3.75 acres. A Notice of Lis Pendens was filed on November 30, 1989, with the Clerk of Court for Marlboro County against Petitioner's real property, which consisted of approximately 3.75 acres of land and a cabin. On December 15, 1989, an Affidavit for Seizure was filed with the Clerk of the State Grand Jury and a Seizure Warrant was filed on December 15, 1989, with the Clerk of the State Grand Jury authorizing the seizure of Petitioner's real property. The State of South Carolina filed a Summons and Complaint for Forfeiture in Rem (89-CP-47-05-033) with the Clerk of the State Grand Jury on December 15, 1989. This case was stayed and later dismissed on

January 6, 1992. A new Summons and Complaint for Forfeiture in Rem (91-CP-47-05-104) was filed with the State Grand Jury against the Petitioner's property on December 20, 1991, with the designation Non-Jury. Petitioner filed a Counter-Return against this Complaint on or about January 17, 1992. A Petition for a Rule to Show Cause was filed by the State on February 12, 1993. A Rule to Show Cause was issued by Judge Edward Cottingham and filed on February 12, 1993, requiring Petitioner and others with interest in Petitioner's property to appear on March 25, 1993, at the Marlboro County Courthouse to show cause why an Order should not be issued forfeiting the said property. An Amended Rule to Show Cause was issued by Judge Cottingham and filed on March 3, 193, with the Clerk of the State Grand Jury requiring Petitioner and others with an interest in said property

to appear on March 22, 1993, or soon thereafter, to show cause why an Order should not be issued forfeiting said property.

A hearing was held on March 30, 1993, in Marlboro County before the Honorable Edward Cottingham. Petitioner was present and was accompanied by his appointed guardian ad litem, Charles G. Vaughan, Jr., Esquire. Petitioner was not represented by an attorney. At that hearing, Petitioner requested an attorney to represent him. The trial court refused Petitioner's request, determining that Petitioner had been given adequate opportunity to obtain legal representation. Petitioner also requested a jury trial which was denied by the trial judge. An Order and Judgment was filed on August 11, 1993, with the Clerk of the State Grand Jury ordering the property to be forfeited to the State of

South Carolina pursuant to S.C. Code Ann. §44-53-520 and §44-53-530 (1976, as amended)

Petitioner appealed to the South Carolina Supreme Court. The South Carolina Supreme Court issued its decisions which are reprinted as Appendix A and B.

The South Carolina Supreme Court affirmed the trial court's ruling, determining that the issues which are pertinent to this appeal were not raised below by the Petitioner. Petitioner timely filed a Motion for Rehearing on the issues relevant to this appeal which was denied by the Court.

REASONS FOR GRANTING THE WRIT

1. A separate civil forfeiture proceeding and a separate criminal prosecution proceeding and sentence violates the Double Jeopardy Clause of the Fifth Amendment made applicable to

the States by the Fourteenth Amendment of the United States Constitution.

Pursuant to the Fifth Amendment of the United States Constitution, no person is to be twice put in jeopardy for the same crime. This protection applies to the states as well as the federal government. **Hess v. Medlock**, 820 F.2d 1368 (4th Cir. 1987) The basis of the Double Jeopardy Clause, both state and federal, is the prohibition against successive attempts to punish in separate proceedings.

The question of whether a forfeiture action constitutes punishment has been answered in the affirmative by this Court in **Austin v. United States**, ____ U.S. ____, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). Under the standards set forth in **Austin**, it is necessary to look at the statute to determine its purpose and function. The South Carolina forfeiture

statutes at issue in this case are tied to the culpability of the owner as the statue provides a means for an innocent owner to recover his property.[1] Also,

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1. S.C. Code Ann. §44-53-520 (Supp. 1994)

> (a) The following are subject to forfeiture:
> (2) all raw materials, products, and equipment of any kind which are used, or which have been positioned or use, in manufacturing, producing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this article;
> (3) all property which is used, or which has been positioned for use, as a container for property described in items (1) or (2);
> (4) All property, both real and personal, which in any manner is knowingly used to facilitate production, manufacturing, distribution, sale, importation, exportation, or trafficking in various controlled substances as defined in this article;
> (7) all property, including, but not limited to, monies, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in

the statute ties forfeiture to the criminal activity of the use of the property. As such, the South Carolina forfeiture statutes were clearly enacted as a means of punishment as well as for arguably remedial purposes. See United States v. $405,089.23 U.S. Currency et al., 33 F.3d 1210 (9th Cir. 1994).

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exchange for a controlled substance, and all proceeds including, but not limited to, monies, and real and personal property traceable to any exchange;

S.C. Code Ann. §44-53-586 (Supp. 1994) - innocent owners
(b) The court may return any seized item to the owner if the owner demonstrates to the court by a preponderance of the evidence:
(1) in the case of an innocent owner, that the person or entity was not a consenting party to, or privy to, or did not have knowledge of, the use of the property which made it subject to seizure and forfeiture.

The second issue is whether the civil forfeiture action constitutes a separate proceeding affording Double Jeopardy protection or whether it is part of the criminal action. The important facts to consider in that regard are the time, place and setting of the forfeiture action as well as the evidence presented.

In this case, the State filed an Affidavit for Seizure and a Summons and Complaint for Forfeiture in Rem (89CP4705033) with the State Grand Jury on December 15, 1989. A Seizure Warrant was also filed on December 15, 1989, with the Clerk of the State Grand Jury, authorizing the seizure of Petitioner's property, the Defendant 3.75 acres with a cabin attached. Petitioner was indicted in March of 1990 and pled guilty on April 7, 1990, to one count of trafficking in cocaine under Indictment 90-GS-47-04-002 and one count of trafficking in marijuana

under Indictment 90-GS-57-05-001 before the Honorable Edward B. Cottingham in Chester, South Carolina. The civil forfeiture action filed on December 15, 1989, was stayed at the request of Petitioner's attorney and with the consent of the State on April 30, 1990. That action was later dismissed on January 6, 1992, as a result of a new Summons and Complaint having been filed by the State under Civil Action Number 91CP4705104 dated December 20, 1991. This forfeiture action was based upon the same activities which the Petitioner was charged with and to which he pled guilty. The Ninth Circuit Court of Appeals recently held that actions such as these violate the Double Jeopardy Clause of the U.S. Constitution. **U.S. v. $405,089.23 U.S. Currency, et al.**, 33 F.3d 1210, 1214 (9th Cir. 1994)

The Fifth Amendment of the United States Constitution bars a subsequent prosecution for the same offense after an acquittal, a subsequent prosecution or the same offense after a conviction and multiple punishments for the same offenses. **United States v. Halper**, 490 U.S. 435, 440, 109 S.Ct. 1892, 1897, 104 L.Ed.2d 487 (1989). In the case at hand, the State seized Petitioner's property, indicted him on criminal charges, consented to a stay of the civil forfeiture, and then refiled a new civil forfeiture action after the Petitioner pled guilty to the criminal charges. The State's actions amount to two trials and two penalties for the same criminal offense.

The forfeiture action in this case was a separate and distinct proceeding from the criminal action. The purpose of the forfeiture, although labeled civil,

was clearly to punish. The forfeiture was instituted at a separate time and tried before a separate fact finding authority, seeking to impose punishment and actually imposing punishment on Petitioner after he had already pled guilty. The State had the ability to institute a criminal forfeiture action but instead chose to institute a second, separate action for the same offense, punishing Petitioner a second time in violation of the Double Jeopardy Clause.

The fact that Petitioner chose to plead guilty to the criminal charges and forego a jury trial does not constitute a waiver of the double jeopardy challenge. In **United States v. Oakes**, 872 F. Supp. 817, (E.D. Wash. 1994), a Washington federal district court held that a guilty plea did not waive the double jeopardy challenge which was based entirely on the facts of the indictment as well as the

record in the prior civil forfeiture and criminal proceeding. In this case, the State prosecuted the civil forfeiture proceeding based entirely upon evidence and testimony used to obtain the criminal indictment and guilty plea.

The Circuits are split on whether or not a parallel proceedings such as the one in this case violates the Double Jeopardy Clause. While the Sixth and Ninth Circuits have ruled in the affirmative, the Second and Eleventh Circuits have held that parallel civil forfeiture actions are not "separate proceedings" for double jeopardy purposes and therefore, there is no double jeopardy violation. **See United States v. Ursery**, 59 F.3d 568 (6th Cir. 1995); **United States v. $405,089.23 U.S. Currency, et al.**, 33 F.3d 1210 (9th Cir. 1994); **United States v. Milan**, 2 F.3d 17 (2nd Cir. 1993); **United States v. One**

Single Family Residence Located at 18755 North Bay Road, Miami, 13 F.3d 1493 (11th Cir. 1994).

In **United States v. Ursery**, 59 F.3d 568 (6th Cir. 1995), the court held that a civil forfeiture followed by a criminal conviction violates double jeopardy. In that case, the court held that the forfeiture and the conviction were "punishment for the same offense because the forfeiture necessarily requires proof of the criminal offense". **Id**. at 573-574. The civil forfeiture and the criminal proceeding were instituted months apart, were presided over by different judges and were determined by separate judgments. The court considered these factors in determining that the two proceedings were not part of a single proceeding, but were in fact, two separate proceedings, to which double jeopardy applies.

In **United States v. $405,089.23 U.S. Currency, et al.**, the government sought forfeiture of money on the grounds that it was the proceeds of illegal narcotic transactions and that the money was the proceeds of money laundering. The government had previously obtained the convictions of the three owners of the money and relied on the same conduct addressed in the criminal case. The Ninth Circuit held the government's strategy was in violation of the Double Jeopardy Clause because the forfeiture action extracted a penalty related to the same criminal conduct and was tantamount to two trials for the same criminal offense.

In this case, the Petitioner's property was seized by the State pursuant to a civil forfeiture action. Petitioner was then indicted and pled guilty to two trafficking charges. After Petitioner

pled guilty, the government instituted another separate civil forfeiture action and based its prosecution on evidence developed or arising out of the criminal charges. This constituted multiple punishment for the same crime in violation of the Double Jeopardy Clause.

Another issue which deserves resolution by this Court is to which proceeding did double jeopardy attach. The Defendant property was seized first by the State pursuant to a civil forfeiture action. Petitioner was then indicted on criminal charges to which he pled guilty. The State then instituted another civil forfeiture action against the Petitioner after he pled guilty.

Petitioner asserts that jeopardy attached when the first civil forfeiture action was filed in December of 1989. Although the land itself was the subject of this action, Petitioner was being

punished by the seizure of his land. The subsequent criminal proceeding was violated the Double Jeopardy Clause.

In **United States v. Nussbaumer**, 890 F. Supp. 947, 948 (D. Or. 1995), the court noted that jeopardy attaches in a criminal action when a guilty plea is accepted by the court and jeopardy attaches in a civil forfeiture proceeding when judgement is entered. **United States v. Stanwood**, 872 F. Supp. 791 (D. Or. 1994) Using this analysis, jeopardy attached in this case in April of 1990 when Petitioner pled guilty and the double jeopardy violation was the subsequent civil forfeiture judgement which was entered on August 11, 1993.

The Ninth Circuit has stated that jeopardy attaches no earlier than the date the defendant files an answer to the forfeiture complaint. **United States v. Barton**, 46 F.3d 51, 52 (9th Cir. 1995)

Following this analysis, Petitioner filed his Counter Return to the second Summons and Complaint on January 17, 1992. Therefore, the civil forfeiture would be a violation of the double jeopardy clause.

Because the circuit courts are split in their decisions regarding the double jeopardy challenge to civil forfeitures and as to when jeopardy attaches in these proceedings, this Court should grant certiorari in this case to clarify the law and establish conformity among the circuit courts and state courts.

2. A separate civil forfeiture proceeding and a separate criminal prosecution and sentence violates the Excessive Fines Clause of the Eighth Amendment of the United States Constitution made applicable to the states by the Fourteenth Amendment.

Petitioner pled guilty and was sentenced with regard to those charges. Despite the plea, the State Grand Jury continued to pursue a course of conduct aimed at punishing the Petitioner. In **Austin v. United States**, ___ U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), the Supreme Court held that the Excessive Fines Clause of the Eighth Amendment is applicable to civil forfeitures. The Supreme Court reserved for the lower court the ability to formulate their own tests to determine excessiveness. Two such tests have been adopted by the lower courts: a proportionality test and an instrumentality test. The Fourth Circuit adopted an instrumentality test in **U.S. v. Chandler and Real Property Known as Tract 1 of Little River Farms**, 1994 W.L. 523993 (4th Cir. (N.C.)).

The three-part instrumentality test considers "(1) the nexus between the

offense and the property and the extent of the property's role in the offense, (2) the role and culpability of the owner, and (3) the possibility of separating offending property that can readily be separated from the remainder." U.S. v. Chandler and Real Property Known as Tract 1 of Little River Farms, 1994 W.L. 523993, *5 (4th Cir. (N.C.)) The court further set forth that the following factors may be taken into account when determining the nexus between the property and the offense:

> "(1) whether the use of the property in the offense was deliberate and planned or merely incidental and fortuitous; (2) whether the property was important to the success of the illegal activity; (3) the time during which the property was illegally used and the special extent of its use; (4) whether its illegal use was an isolated event or has been repeated; and (5) whether the purpose of acquiring, maintaining or using the property was to carry out the offense." Id at *6.

These factors are to be looked at as a whole with no one factor being disposition.

From the Record and the State's own admissions, there was little, if any, nexus between Petitioner's home, which is the subject of the forfeiture action, and any drug activity. (State's attorney admitted that the State was not contending that drugs were imported at the home and that to the State's knowledge, Petitioner avoided drug deals at the home, R. p. 132, lines 4-7; Special Agent Butch Knight testified that he had recovered only a small quantity of marijuana and cocaine residue from the house on only one occasion, R. p. 102, lines 8-12; Ken Hoover testified that Petitioner told him he did not do any dealing at the home, R. p. 121, lines 3-4, and that there were never any large quantities of drugs at the house, R. p.

120, lines 23-25; James Carlos Plyler testified that he never saw any cocaine in the home, R. p. 123, line 23-p. 42, line 6) The only activity the State could tie to the house was one payment made by Darlene Boyd which was allegedly made for drugs. (R. p. 128, lines 15-18) Although the State purportedly was not going forward on the theory that the home facilitated the drug business and instead was pursing the forfeiture based upon its alleged purchase with drug proceeds, almost all of the State's evidence dealt with attempts to tie the drug trade into the home.

Petitioner sets forth that the above facts in light of the factors to consider in analyzing the nexus prong of the test demonstrates that no nexus existed between the Petitioner's real property and the drug transactions for which Petitioner was accused or to which he

pled guilty. Petitioner's real property was not used in any way with drug activity, either deliberately or planned, incidental or fortuitously. Petitioner's cabin played no part in the alleged drug activity. The cabin was not used during the alleged conspiracy nor was it used in furtherance of the alleged conspiracy. If the property was ever used during the alleged conspiracy, which was denied, its use was isolated. The real property was in no way acquired, maintained or used to carry out the conspiracy and no competent evidence existed to assert such. Therefore, the State failed to establish any nexus between the real property and the alleged conspiracy.

Special Agent Eddie Jordan testified that Petitioner indicated that his income came from gambling which was consistent with Petitioner's contentions at trial and the testimony of the State's witness

Kenny Ray Taylor. (R. p. 126, lines 10-16; R. p. 145, lines 11-13) Petitioner was given an extension by the court to produce evidence of his income which he did by timely supplying the court with his income tax returns which evidenced $36,000.00 earned in 1986 from gambling. Petitioner only paid $7,500.00 for the property and his family and friends helped him fix it up. Petitioner submits that he presented the court with substantial evidence that he earned enough income to purchase the property and that information combined with the trial testimony that Petitioner did much of the repair work himself was substantial evidence that the home and land was not purchased with drug proceeds.

Considering the factors outlined above, there was no showing that the use of the property was deliberate or planned

in the drug trade. Quite to the contrary, there was substantial evidence that the home was not used to further the drug business and that no drug activity occurred there. Since drug activity did not occur at the home, the property was certainly not important to the success of the drug trade. As there were no allegations that the property was illegally used, factors three and four do not apply. There was no testimony that the property was purchased to carry out the drug trade. Considering these factors, it is impossible to establish a nexus between the offense (drugs trafficking) and the property. From the evidence of record and the Petitioner's affidavit submitted with his income tax returns, the property can easily be separated from the drug activity which Petitioner pled guilty to in a separate action. Applying the factors as set

forth by the Fourth Circuit in **United States v. Chandler and Real Property Known as Tract 1 of Little River Farms**, 1994 W.L. 523994 (4th Cir. (N.C.)), Petitioner submits that the civil forfeiture was a violation of the Excessive Fines clause of the Eighth Amendment.

Petitioner further submits that the test outlined above is not the proper test in this case because it is a instrumentality test rather than a proportionality test. There was no evidence of record that the cabin was used as an instrument in the drug trade and the State contended that it was pursuing the forfeiture wholly based on a proceeds analysis. Accordingly, the forfeiture should only be evaluated in a proportionality context. Petitioner submits that he submitted substantial evidence to the court which refuted the

State's claims that he did not generate any income so that the income for the property must have come from drug proceeds. Petitioner also submits that the testimony at trial refutes the State's allegations because the testimony reflected that Petitioner did much of the improvements on the property himself. (Special Agent Eddie Gordon testified that Petitioner told him that the fence erected around the home, which was one of the improvements cited by the State, belonged to Petitioner's brother, R. pp. 132-133) Petitioner has consistently maintained that the improvements on the home were constructed by Petitioner himself or by his friends and relatives.

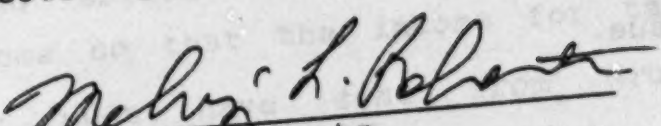
Petitioner submits that the Eighth Amendment Excessive Fines issue and the implications of **Austin v. United States**, ___ U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), should be reheard for a

determination on the merits of that issue.

CONCLUSION

By instituting a separate civil proceeding after Petitioner had already pled guilty, the government violated the Petitioner's rights afforded by the Double Jeopardy Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment of the United States Constitution. The decision of the South Carolina Supreme Court has violated the aforementioned rights of the Petitioner. This Court should accept Certiorari to address these matters.

Respectfully submitted,



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APPENDIX
PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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Attorney for Petitioner

APPENDIX A

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Ex parte: Charles Eugene Carpenter,

Appellant,

In re: T. Travis Medlock,
Attorney General for the State
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Respondent,

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1982, and on June 1, 1982, and
to another party in approximately
1986, but no deed was recorded,
Defendants.

Appeal From Marlboro County
Edward B. Cottingham, Judge

Opinion No. 24249
Heard March 21, 1995 - Filed May 30, 1995

AFFIRMED

Melvin L. Roberts, of York, for appellant.

T. Travis Medlock, Attorney General, Charles W. Gambrell, Jr., Chief Deputy Attorney, and Anne Hunter Young, Assistant Attorney General,

All of Columbia, for respondent.

PER CURIAM: **Scott v. Illinois**, 440 U.S. 367 (1979)(no sixth amendment right to counsel where no deprivation of physical liberty); **First Savings Bank v. McLean**, ___ S.C. ___, 444 S.E.2d 513 (1994)(continuance within trial judge's discretion); **Talley v. S.C. Higher Educ. Tuition Grants Committee**, 289 S.C. 483, 347 S.E.2d 99 (1986)(issue not raised below is not preserved for appeal).

s/ Ernest A. Finney, Jr. C.J.

s/ Jean H. Toal A.J.

s/ James E. Moore A.J.

s/ John H. Waller, Jr. A.J.

s/ A. Lee Chandler A.A.J

APPENDIX B

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Ex parte: Charles Eugene Carpenter,

Appellant,

In re: T. Travis Medlock,
Attorney General for the State
of South Carolina,
Respondent,

v.

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to another party in approximately
1986, but no deed was recorded,
Defendants.

ORDER

The following Order has been endorsed on your Motion for Rehearing in the above entitled case on appeal.

"Petition for Rehearing is denied.

s/ Ernest A. Finney, Jr. C.J.

s/ Jean H. Toal A.J.

s/ James E. Moore A.J.

John H. Waller, Jr. A.J.

A. Lee Chandler A.A.J

June 30, 1995."

Supreme Court, U.S.
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TO THE SUPREME COURT OF THE
UNITED STATES FROM THE SUPREME COURT OF
THE STATE OF SOUTH CAROLINA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT

Respondent, State of South Carolina, hereby submits this Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of the United States.

QUESTIONS PRESENTED

I.

Whether the Double Jeopardy issue should be considered by the United States Supreme Court in a Writ of Certiorari where Petitioner failed to raise the Double Jeopardy issue before the trial court and the South Carolina Supreme Court refused to rule upon the issue, and if Petitioner's Double Jeopardy issue is appropriate for review, whether the forfeiture cause of action violated the Double Jeopardy Clause of the Fifth Amendment?

II.

Whether the Excessive Fines issue should be considered by the United States

Supreme Court in a Writ of Certiorari where Petitioner failed to raise the Excessive Fines issue before the trial court and the South Carolina Supreme Court refused to rule upon the issue, and if Petitioner's Excessive Fines issue is appropriate for review, whether the forfeiture cause of action violated the Excessive Fines Clause of the Eighth Amendment?

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OPINION BELOW

On March 30, 1993, a forfeiture hearing against Petitioner's subject property was held before the Honorable Edward B. Cottingham. At the conclusion of the March 30, 1993 forfeiture hearing, the trial court provided Petitioner the opportunity to submit sworn affidavits regarding Petitioner's property and proof of how Petitioner had paid for the subject property. Petitioner submitted a sworn affidavit dated April 23, 1993, together with exhibits, to the trial court for consideration. After having considered Petitioner's sworn affidavit dated April 23, 1993, Judge Cottingham issued an Order and Judgment filed on August 11, 1993 with the Clerk of the State Grand Jury which ordered that the Defendant property be forfeited to the State of South Carolina pursuant to Sections 44-53-520 and 44-53-530, Code of Laws of South Carolina

(1976), as amended. The South Carolina Supreme Court affirmed the forfeiture of the Defendant property in Opinion Number 24249, which was filed on May 30, 1995. A Motion for Rehearing was filed on behalf of Petitioner, and the South Carolina Supreme Court issued the Order Denying Rehearing on June 30, 1995.

STATEMENT OF THE CASE

In March of 1990, the South Carolina State Grand Jury returned two (2) indictments charging Petitioner Charles Eugene Carpenter with two (2) counts of trafficking in cocaine and two (2) counts of trafficking in marijuana. Each count carried a mandatory minimum term of imprisonment of twenty-five (25) years without possibility of parole. After having entered a plea agreement with the State, Petitioner pled guilty on April 7, 1990 to one count of trafficking in cocaine under Indictment 90-GS-47-05-002

and one count of trafficking in marijuana under Indictment 90-GS-47-05-001 before the Honorable Edward B. Cottingham at the Chesterfield County Courthouse. At the April 7, 1990 hearing, Judge Cottingham questioned Petitioner extensively and made a finding of fact on the record, beyond a reasonable doubt, that Petitioner fully and voluntarily entered both the plea agreement and the guilty pleas, and further, that Petitioner understood and waived all constitutional rights.

On June 4, 1990, a sentencing hearing was held regarding Petitioner's aforementioned guilty pleas. At the sentencing hearing, the State contended that Petitioner had not fulfilled his obligations under the plea agreement and so recommended the imposition of consecutive sentences. Judge Cottingham sentenced Petitioner to twenty-five (25) years without parole and imposed a fine of

$200,000 relative to Indictment 90-GS-47-05-002 (the cocaine indictment). Judge Cottingham then ruled that a second sentencing hearing was required in order to enable Petitioner to contest the State's position with regard to the imposition of a consecutive sentence relative to Indictment 90-GS-47-05-001 (the marijuana indictment).

On August 9, 1990, the second sentencing hearing was held before Judge Cottingham relative to the issue of Petitioner's conformance or nonconformance with the terms of the plea agreement. At the conclusion of the second sentencing hearing, Judge Cottingham made a finding of fact, beyond a reasonable doubt, that Petitioner had failed to conform to the terms of the plea agreement. Judge Cottingham then sentenced Petitioner to twenty-five (25) years without parole and imposed a find of $50,000 relative to

Indictment 90-GS-47-05-001 and further ordered that this sentence be run consecutive to Indictment 90-GS-47-05-002. Pursuant to the Order filed on February 3, 1992 with the Clerk of the State Grand Jury, Judge Cottingham made his original order imposing consecutive sentences final and divested his jurisdiction over the criminal matter.

In regard to the forfeiture cause of action involving Petitioner's subject property,[1] a Notice of Lis Pendens was filed on November 30, 1989 with the Marlboro County Clerk of Court's Office against Petitioner's real property more fully described as follows:

DEED OF JANUARY 22, 1982

> All that certain piece, parcel or tract of land lying and being situate in the State of South Carolina, County of Marlboro and being shown and designated on that certain plat entitled

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[1]Petitioner was not the titled owner of record of the Defendant property.

"Compiled May Property"-Sandhill Recreation Club, Inc.-prepared by John M. Jackson, III., R.L.S. and dated June 4, 1981. Said plat being recorded in the Office of the Clerk of Court for Marlb o County in Plat Book 36 at Page 64.

The property described above was conveyed by C. R. May III and A. Matheson May to **David Reep** and **Vaunice Reep** by Deed of January 22, 1982, recorded Deed Book Volume 186, Page 217.

DEED OF JUNE 1, 1982

All that certain piece, parcel or tract of land containing 2 acres, more or less, lying and being situate in the County of Marlboro, State of South Carolina, shown and designated on that certain plat entitled "Map of Land, Property of Sandhills Recreation Club, Inc. to be conveyed to David Reep" prepared by Carl Maness, L.S., dated May 20, 1982, and recorded in the Office of the Clerk of Court for Marlboro County in Plat Book 37, Page 31.

For a more particular description as to courses and distances, metes and bounds, reference in craved to the aforementioned plat.

The above property is a portion of that property conveyed to Sandhill Recreation Club, Inc. by Deed of Charles R. May, III,

et al., recorded in Deed Book 181, Page 124 in the Office of the Clerk of Court for Marlboro County, South Carolina.

The property is sold subject to Restrictions recorded in Deed Book 190, Page 4, recorded May 31, 1982, in the Office of the Clerk of Court for Marlboro County.

It is understood and agreed that no cattle, hogs, horses or other livestock, including poultry, shall be maintained or kept on the aforementioned tract.

The property described above was conveyed by Sandhill Recreation Club, Inc. by its President, William J. Weatherly to **David Reep** and **Vaunice Reep** by Deed of June 1, 1982, recorded Deed Book Volume 190, Page 23.

The property described above was subsequently conveyed to another party in 1986 but the Deed of Conveyance has not been recorded.

On December 15, 1989, an Affidavit For Seizure was filed with the Clerk of the State Grand Jury for the purposes of documenting Petitioner's participation in the purchase, sale and distribution of cocaine and marijuana and providing the subsequent

basis of Petitioner's aforementioned property being subject to seizure and forfeiture. This Affidavit For Seizure provided information that Petitioner's subject property was purchased with proceeds derived from illegal drug activity and that Petitioner had bragged about making three to four million dollars by selling illegal drugs. (Affidavit for Seizure, R.pp.6-8). Having considered the facts set forth in the aforementioned Affidavit For Seizure, the Honorable J. Ernest Kinard, Jr. signed a Seizure Warrant, which was filed on December 15, 1989 with the Clerk of the State Grand Jury, authorizing the seizure of Petitioner's subject property as above described. The State further filed on December 15, 1989 a Summons and Complaint For Forfeiture In Rem under Civil Action Number 89CP4705033 with the Clerk of the State Grand Jury against Petitioner's

subject property.[2] At the request of Petitioner's attorney and with the consent of the State, an Order staying the forfeiture cause of action under Civil Action Number 89CP4705033 was issued by Judge Cottingham and filed on April 30, 1990 with the Clerk of the State Grand Jury. An Order of Dismissal involving Civil Action Number 89CP4705033 was filed on January 6, 1992 with the Clerk of the State Grand Jury as a result of a new Summons and Complaint For Forfeiture In Rem having been filed by the State under Civil Action Number 91CP4705104 against Petitioner's subject property.

The Summons and Complaint For Forfeiture In Rem under Civil Action Number 91CP4705104 was filed on December 20, 1991 with the Clerk of the State Grand Jury against Petitioner's subject

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[2]South Carolina has not enacted criminal forfeiture statutes for drug violations.

property, being the same property as previously described in the Notice of Lis Pendens and Complaint For Forfeiture In Rem under Civil Action Number 89CP4705033. A Counter Return Against Complaint For Forfeiture under Civil Action Number 91CP4705104 designating Non-Jury was signed on January 17, 1992 by Petitioner and returned to the State. A Petition For A Rule To Show Cause was filed on February 12, 1993 on behalf of the State praying that Petitioner show cause as to why an Order should not be issued forfeiting the Defendant property, which was seized pursuant to the aforementioned Seizure Warrant. A Rule To Show Cause was issued by Judge Cottingham and filed on February 12, 1993 with the Clerk of the State Grand Jury requiring Petitioner, and others with interests in the Defendant property, to appear on March 25, 1993 at the Marlboro County Courthouse and to show cause why an

Order should not be issued forfeiting the Defendant property. A Petition For Appointment Of Guardian Ad Litem And Order was also filed on February 12, 1993 by the State in order for a Guardian ad Litem to be appointed to represent Petitioner, an imprisoned person, and Charles G. Vaughan, Jr., Esquire, was duly appointed guardian ad litem to represent the interests of Petitioner. Subsequently, an Amended Rule To Show Cause was issued by Judge Cottingham and filed on March 3, 1993 with the Clerk of the State Grand Jury requiring Petitioner, and others with interests in the Defendant property, to appear on March 22, 1993, or as soon thereafter as the matters might be heard, and to show cause why an Order should not be issued forfeiting the Defendant property.

Pursuant to the Amended Rule to Show Cause, a forfeiture hearing was held on

March 30, 1993 before Judge Cottingham at the Marlboro County Courthouse. Petitioner was present for the hearing and was accompanied by his guardian ad litem, Charles G. Vaughan, Jr., Esquire. Petitioner was not represented by an attorney at the March 30, 1993 forfeiture hearing. Petitioner informed the trial court that Petitioner wanted an attorney to represent him at the hearing. The trial court determined that Petitioner had been aware of the pending matter, was duly notified of the proceedings, and had been given adequate opportunity to obtain legal representation.[3] (R.p.85, line 6 - p.88, line 5). At the conclusion of the March 30, 1993 forfeiture hearing, the trial court provided Petitioner the opportunity to submit sworn affidavits regarding

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[3]Appellant had further requested a jury trial for the first time at the March 30, 1993 hearing, and the trial court denied Appellant's request. (R.p.90, line 4 - p.91, line 19).

Petitioner's property and proof of how Petitioner had paid for the subject property. (R.p.148, lines 6-8, 19-25; R.p.150, lines 5-16; R.p.151, lines 17-22; R.p.152, line 18 - p.153, line 2). Petitioner submitted a sworn affidavit dated April 23, 1993, together with exhibits, to the trial court for consideration. After having considered Petitioner's sworn affidavit dated April 23, 1993, Judge Cottingham issued an Order and Judgment filed on August 11, 1993 with the Clerk of the State Grand Jury which ordered that the Defendant property be forfeited to the State of South Carolina pursuant to Sections 44-53-520 and 44-53-530, Code of Laws of South Carolina (1976), as amended. Petitioner appealed to the South Carolina Supreme Court the Order and Judgment filed on August 11, 1993 with the Clerk of the State Grand Jury under Civil Action Number 91CP4705104.

The South Carolina Supreme Court affirmed the trial court's ruling as set forth in the Order and Judgment filed on August 11, 1993. In affirming the trial court's ruling, the South Carolina Supreme Court refused to consider issues raised for the first time on appeal; among the issues not raised at the trial court level were those involving the Double Jeopardy Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment. The South Carolina Supreme Court cited Talley v. S.C. Higher Educ. Tuition Grants Committee, 289 S.C. 483, 347 S.E.2d 99 (1986), for the proposition that issues not raised below are not preserved for appeal. Accordingly, the South Carolina Supreme Court followed stringent waiver rules and refused to rule on the Double Jeopardy and Excessive Fines issues, which were raised for the first time on appeal. A Motion for Rehearing

was filed on behalf of Petitioner, and the South Carolina Supreme Court issued the Order Denying Rehearing on June 30, 1995. Petitioner subsequently filed the Petition for a Writ of Certiorari to the Supreme Court of the United States on September 28, 1995. The Supreme Court of the United States is now being petitioned to rule upon the Double Jeopardy and Excessive Fines issues for the first time through a Writ of Certiorari.

SUMMARY OF THE ARGUMENTS

Petitioner failed to raise the Double Jeopardy and Excessive Fines issues at the trial court level, and the South Carolina Supreme Court refused to rule upon the two issues for the first time on appeal. Petitioner is now seeking review of the Double Jeopardy and Excessive Fines issues through the Petition for a Writ of Certiorari to the Supreme Court of the United States. Although Petitioner waived

the right to raise these two issues on appeal, a review of the Double Jeopardy Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment in connection with the criminal and civil forfeiture proceedings against Petitioner indicates that no violations occurred. The circumstances involving the simultaneous pursuit by the State of South Carolina of criminal and civil forfeiture matters against Petitioner fall within the contours of a single, coordinated prosecution. The South Carolina Legislature has authorized cumulative punishment under criminal and civil statutes for a single course of conduct. Thus, the Double Jeopardy Clause does not bar separate criminal and civil forfeiture proceedings. Furthermore, Petitioner's subject property was forfeited on the proceeds theory inasmuch as it constituted, and was derived from, drug

proceeds. The forfeiture of proceeds obtained as a result of illegal drug activities is not subject to the excessiveness challenge under the Excessive Fines Clause of the Eighth Amendment.

ARGUMENT

I.

PETITIONER'S DOUBLE JEOPARDY ISSUE SHOULD NOT BE CONSIDERED BY THE UNITED STATES SUPREME COURT IN A WRIT OF CERTIORARI WHERE PETITIONER FAILED TO RAISE THE DOUBLE JEOPARDY ISSUE BEFORE THE TRIAL COURT AND THE SOUTH CAROLINA SUPREME COURT REFUSED TO RULE UPON THE ISSUE, AND IF PETITIONER'S DOUBLE JEOPARDY ISSUE IS APPROPRIATE FOR REVIEW, THE FORFEITURE CAUSE OF ACTION DOES NOT VIOLATE THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT.

A. Petitioner failed to raise the Double Jeopardy issue before the trial court and the South Carolina Supreme Court refused to rule upon the issue.

Petitioner failed to raise the Double Jeopardy issue before the trial court in regard to the forfeiture cause of action under Civil Action Number 91CP4705104. As a result, the trial court was not afforded the opportunity to rule upon the Double Jeopardy issue. The South Carolina Supreme Court has consistently held that

ARGUMENT

I.

issues which are neither presented to nor passed upon by the trial judge may not be raised for the first time on direct appeal. Degenhart v. Knights of Columbus, ___ S.C. ___, 420 S.E.2d 495 (1992); Nichols v. Amalgamated Clothing And Textile Workers Union, 305 S.C. 323, 408 S.E.2d 237 (1991), cert. denied ___ U.S. ___, 112 S.Ct. 873, 116 L.Ed.2d 778 (1992); Goddard v. Fairways Development General Partnership, ___ S.C. ___, 426 S.E.2d 828 (Ct. App. 1993); Price v. Pickens County, ___ S.C. ___, 416 S.E.2d 666 (Ct. App. 1992); Jennings v. Dargan, ___ S.C. ___, 417 S.E.2d 646 (Ct. App. 1992); reh'g denied, opinion amended; Soaper v. Hope Industries, Inc., 306 S.C. 531, 413 S.E.2d 38 (Ct. App. 1992); cert. granted in part, cert. denied in part, aff'd as modified, ___ S.C ___, 424 S.E.2d 493 (1992). Petitioner thus waived the right to raise the Double Jeopardy issue

for the first time on appeal, and the South Carolina Supreme Court refused to rule upon the issue. (Appendix A p. 3).

B. If Petitioner's Double Jeopardy issue is appropriate for review, the forfeiture cause of action does not violate the Double Jeopardy Clause of the Fifth Amendment.

Even assuming arguendo that the Court should examine the Double Jeopardy issue, the forfeiture cause of action under Civil Action Number 91CP4705104 did not violate the Double Jeopardy Clause by imposing multiple punishments or prosecutions for the same offense against Petitioner. Pursuant to Section 44-53-520, et. seq., Code of Laws of South Carolina (1976), as amended, the State brought a separate in rem civil forfeiture cause of action against Petitioner's subject property alleging that it was purchased with drug proceeds and was used to facilitate drug

activities. The State's forfeiture cause of action under Civil Action Number 91CP4705104 contained necessary elements for forfeiture which were not contained in Petitioner's two criminal convictions.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This guarantee applies to both successive punishments and to successive prosecutions for the same offense. North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). In U.S. v. Dixon, ___ U.S. ___, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), the United States Supreme Court overruled the "essential elements test" established in Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 556 (1990). Consequently, the Court must apply the "same elements test" or

"Blockburger" test in order to determine whether a subsequent prosecution is barred by the Double Jeopardy Clause. See Blockburger v. U.S., 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932). In applying the "same elements test", an inquiry must be made as to whether or not such offense contains an element not contained in the other. If not, they are the same offense within the Double Jeopardy Clause's meaning and double jeopardy bars subsequent prosecution as punishment.

Petitioner contends that the forfeiture of his subject property constitutes punishment for the same criminal offenses to which he has been convicted. Petitioner cites Austin v. U.S., ___ U.S. ___, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993), to support his contention that the Double Jeopardy Clause bars the forfeiture. The State submits,

however, that Austin ruled solely on the issue as to whether or not the Excessive Fines Clause of the Eighth Amendment applies to in rem civil forfeiture proceedings. The court in Austin did not consider the Double Jeopardy Clause in regard to in rem civil forfeiture proceedings. Further, the Double Jeopardy Clause has been held not to apply in civil forfeiture causes of action where forfeitures are properly characterized as remedial in nature. U.S. v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984).

The Double Jeopardy Clause of the Fifth Amendment does not prohibit a civil forfeiture proceeding and sanction which may be characterized as remedial. U.S. v. Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989). The Halper decision does not prevent the State from seeking and obtaining the civil forfeiture of

Petitioner's property as well as the criminal convictions of Petitioner. The forfeiture of Petitioner's property did not constitute punishment under the Double Jeopardy Clause, because Petitioner's property was forfeited on the proceeds theory. Consequently, Petitioner was not deprived of anything to which Petitioner was legally entitled. Dawkins v. U.S., 883 F.Supp. 83 (E.D. Va. 1995). Furthermore, Petitioner's separate civil forfeiture proceeding and separate criminal prosecutions did not violate the Double Jeopardy Clause; the simultaneous pursuit of these matters fell within the contours of a single, coordinated prosecution. U.S. v. One Single Family Residence, 13 F.3d 1493 (11th Cir. 1994).

Petitioner made millions of dollars from illegal drug transactions. (Affidavit for Seizure, R.p.8; R.p.126, line 25 - p.127, line 2). Petitioner

purchased the subject property for $7,500.00 in cash and had the title to the property transferred to a designated third person's name. Petitioner made improvements to the subject property at an estimated value ranging from $25,000 to $50,000. (R.p.109, line 3 - p.116, line 24). The trial court provided Petitioner the opportunity to submit sworn affidavits as to what legitimate sources of income were used towards the purchase and improvement of the subject property. (R.p.148, lines 19-25; R.p.150, lines 5-16; R.p.151, lines 17-22; R.p.152, line 18 - p.153, line 2). After having considered Petitioner's sworn affidavit dated April 23, 1993, the trial court ordered that the subject property be forfeited to the State of South Carolina.

The forfeiture of Petitioner's property was remedial in nature, because the forfeiture of proceeds cannot be

considered punishment. U.S. v. Alexander, 32 F.3d 1231 (8th Cir. 1994). Petitioner was placed in a position as before the criminal activity began and was simply separated from the fruits of the drug trade. U.S. v. Wild, 47 F.3d 669 (4th Cir. 1995). The forfeiture allowed the State to sell Petitioner's property and to offset expenses incurred by the State's extensive investigation of Petitioner's illegal drug activities. Furthermore, the value of Petitioner's property did not exceed an amount deemed as punishment, setting aside the fact that the subject property was purchased and improved with drug proceeds from Petitioner's criminal drug trade.

II.

PETITIONER'S EXCESSIVE FINES ISSUE SHOULD NOT BE CONSIDERED BY THE UNITED STATES SUPREME COURT IN A WRIT OF CERTIORARI WHERE PETITIONER FAILED TO RAISE THE EXCESSIVE FINES ISSUE BEFORE THE TRIAL COURT AND THE SOUTH CAROLINA SUPREME COURT REFUSED TO RULE UPON THE ISSUE, AND IF PETITIONER'S EXCESSIVE FINES ISSUE IS APPROPRIATE FOR REVIEW, THE FORFEITURE CAUSE OF ACTION DOES NOT VIOLATE THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT.

A. Petitioner failed to raise the Excessive Fines issue before the trial court and the South Carolina Supreme Court refused to rule upon the issue.

Petitioner failed to raise the Excessive Fines issue before the trial court in regard to the forfeiture cause of action under Civil Action Number 91CP4705104. Consequently, the trial court was not afforded the opportunity to rule upon whether or not the Excessive Fines Clause of the Eighth Amendment was violated by the forfeiture cause of

action. The South Carolina Supreme Court has consistently held that issues which are neither presented to nor passed upon by the trial judge may not be raised for the first time on direct appeal. Degenhart, supra; Nichols, supra; Goddard, supra; Price, supra; Jennings, supra; Soaper, supra. Petitioner thus waived the right to raise the Excessive Fines issue for the first time on appeal, and the South Carolina Supreme Court refused to rule upon the issue. (Appendix A p. 3).

B. If Petitioner's Excessive Fines issue is appropriate for review, the forfeiture cause of action does not violate the Excessive Fines Clause of the Eighth Amendment.

Even assuming arguendo that the Court should examine the Excessive Fines issue, the forfeiture cause of action under Civil Action Number 91CP4705104 did not violate the Eighth Amendment to the United States

Constitution by creating an excessive civil sanction in relation to Petitioner's criminal sentences. The State brought a civil forfeiture cause of action against Petitioner's subject property pursuant to Section 44-53-520, Code of Laws of South Carolina (1976), as amended, on the basis that the subject property was purchased with proceeds derived from illegal drug transactions and was further used to facilitate distribution, sale, or trafficking in illegal controlled substances. The trial court considered the testimony and evidence and later ordered that the Defendant property be forfeited to the State of South Carolina.

Petitioner was a known drug dealer during the time he acquired the subject property. (R.p.99, line 9 - p.100, line 6; R.p.100, line 18 - p.101, line 8: R.p.101, line 23 - p.105, line 12; R.p.118, line 6 - p.120, line 11; R.p.121,

lines 9-10; R.p.122, line 11 - p.123, line 13; R.p.124, lines 10-11; R.p.125, line 10 - p.130, line 6; R.p.142, line 11 - p.143, line 19; R.p.144, line 20 - p.145, line 15). The State presented evidence that Petitioner purchased the subject property in cash, had title to the subject property transferred to an individual other than Petitioner, and made improvements to the subject property worth at least $25,000 in value. (R.p.109, line 3 - p.116, line 24). The record also reflects that Petitioner was earning millions of dollars in illegal drug transactions during the acquisition and improvement of the subject property and that Petitioner maintained control over the subject property during this period of time. In addition to showing that illegal substances were seized from the subject property, the State presented evidence that the subject property was purchased by Petitioner with

proceeds derived from illegal drug transactions. (R.p.99, line 9 - p.100, line 6; R.p.100, line 18 - p.101, line 8: R.p.101, line 23 - p.105, line 12; R.p.118, line 6 - p.120, line 11; R.p.121, lines 9-10; R.p.122, line 11 - p.123, line 13; R.p.124, lines 10-11; R.p.125, line 10 - p.130, line 6; R.p.142, line 11- p.143, line 19; R.p.144, line 20 - p.145, line 15).

The forfeiture of the subject property cannot be reasonably viewed as an excessive fine against Petitioner in light of the circumstances and the evidence presented at trial against the subject property. Furthermore, in Austin, supra, the United States Supreme Court ruled that the determination of whether a forfeiture is constitutionally excessive should be made by the trial court; the trial court was not afforded the opportunity to do so in this matter.

The forfeiture of Petitioner's property did not deprive Petitioner of anything to which he was legally entitled, because Petitioner purchased the subject property with drug proceeds. The drug proceeds were derived from Petitioner's criminal activity, and Petitioner had no legal right to those proceeds. Dawkins v. U.S., 883 F.Supp. 83 (E.D. Va. 1995). As a result of the forfeiture, Petitioner has merely been placed in the position which he held prior to launching his criminal drug activity. Furthermore, the forfeiture of proceeds cannot be considered punishment and is not subject to the Excessive Fines Clause of the Eighth Amendment. U.S. v. Wild, 47 F.3d 669 (4th Cir. 1995); U.S. v. Alexander, 32 F.3d 1231 (8th Cir. 1994). The forfeiture of the subject property merely parted Petitioner from the fruits of his criminal drug activity. Petitioner was not

punished, and the forfeiture of the subject property cannot be considered excessive and in violation of the Excessive Fines Clause of the Eighth Amendment.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

October 31, 1995
Columbia, South Carolina